Legislative Summary LS-432E

BILL C-9: AN ACT TO AMEND THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT

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LEGISLATIVE HISTORY OF BILL C-9

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-9: AN ACT TO AMEND THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

Bill C-9, an Act to amend the Canadian Environmental Assessment Act, was introduced and deemed read a second time and referred to the House of Commons Standing Committee on Environment and Sustainable Development on 9 October 2002.(1) The Committee reported the bill to the House on 27 January 2003. **The bill was passed in the House of Commons on 6 May 2003, in the Senate on 5 June 2003, and received Royal Assent on 11 June 2003.** Sponsored by the Minister of the Environment, this bill amends the *Canadian Environmental Assessment Act*, which was passed in 1992 and proclaimed in force in 1995.

BACKGROUND

The current *Canadian Environmental Assessment Act* (hereinafter the *CEAA* or the Act) was initially introduced in the House of Commons as Bill C-78 in June 1990 and was referred for pre-study to a Special Committee of the House. The bill died in committee when Parliament was prorogued in May 1991, but it was reinstated as Bill C-13 on 29 May 1991. Bill C-13 was passed and given Royal Assent on 23 June 1992.

The *CEAA* replaced the Environmental Assessment and Review Guidelines Order (the EARP Guidelines), passed by Order in Council on 21 June 1984. These guidelines governed environmental assessments at the federal level until the new legislation was brought in.

At the time, the EARP Guidelines were considered to be mere administrative directives whose application was discretionary. In the 1992 landmark case of *Friends of the*

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) The bill was originally introduced in the 1st session of the 37th Parliament as Bill C-19, but died on the *Order Paper* when Parliament was prorogued on 16 September 2002. By a motion adopted on 7 October 2002, the House of Commons provided for the reintroduction in the 2nd session of legislation that had not received Royal Assent. The bills would be reinstated at the same stage in the legislative process they had reached when the previous session was prorogued.

Oldman River Society v. *Canada*, however, the Supreme Court of Canada held otherwise. It ruled that the Guidelines had the force of law and had to be complied with in all cases to which they applied.

This decision was important not only because of what the Court said about the application of the EARP Guidelines, but also because of what it said about the constitutional jurisdiction over environmental assessments in Canada. Having noted that the environment was not a discrete head of power under the Constitution, and describing it as an "abstruse" matter that did not fit comfortably within the existing division of powers without considerable overlap and uncertainty, the Supreme Court of Canada held that the environment was a shared area of responsibility and that both orders of government could validly enact environmental measures that related to their respective spheres of legislative authority under the Constitution.

The *Oldman* decision was hailed as a victory for the federal government because, until then, questions had persisted about whether the federal government could carry out an environmental assessment of projects thought to be "purely provincial" in nature. The issue was laid to rest in *Oldman*: if a proposal impinged upon a federal head of power (for example, the construction by a province of a power dam that might interfere with the federal responsibility over navigable waters), the federal Parliament could legitimately enact measures to assess the environmental effects of such projects, as a valid exercise of its constitutional jurisdiction over "navigation and shipping."

Although federal legislation to replace the EARP Guidelines was introduced (as Bill C-78) about 18 months before the *Oldman* decision was rendered, the Court's judgement provided Parliament with added impetus to pass Bill C-13, which was still before the House of Commons when the ruling was handed down on 23 January 1992.

Bill C-13, the current *Canadian Environmental Assessment Act*, was passed on 23 June 1992. However, it was not proclaimed in force until January 1995 because regulations essential to the Act's application had to be developed beforehand.

BASIC FEATURES OF THE CURRENT *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

The Act requires that a federal environmental assessment be carried out in relation to a "project" for which a "federal authority" exercises one or more of the functions set out under section 5.

A. The "Project" Requirement

In order for the Act to apply, there must first be a "project." Not all proposals qualify as a "project," only those that come within the definition of that term in section 2, namely:

- any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to a physical work; or
- any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities prescribed in the *Inclusion List Regulations* made pursuant to section 59(b).

Even if a proposal qualifies as a "project," it may not be subject to a federal environmental assessment if it has been excluded under the *Exclusion List Regulations* made pursuant to section 59(c). Projects may be excluded under this section:

- where an environmental assessment of the project would be inappropriate for reasons of national security; or
- where the project is in relation to a physical work (as opposed to a physical activity), the environmental effects of the project are insignificant or the federal contribution to the project is minimal.

B. The "Federal Authority" Requirement

As a rule, only projects involving a "federal authority" are subject to a federal environmental assessment. Defined in section 2 of the Act, this term includes Ministers of the Crown and federal departments, but excludes specified entities, such as Crown corporations, harbour and port authorities, and native band councils. However, there is authority to develop regulations in relation to the excluded entities under section 59(j) to (l).

Projects having transboundary effects within the meaning of sections 46 to 48 are an exception to the rule. In their case, an environmental assessment may be carried out at the Minister's discretion only if there is no "federal authority" involvement with the project.

C. The "Federal Duty or Function" Requirement (the "Trigger")

Projects involving one or more federal authorities are subject to an environmental assessment only if the federal authority (or federal authorities) exercises or performs one or more

of the powers, duties or functions (known as "triggers") specified in section 5 of the Act. The requisite triggers include:

- The "*proponent trigger*," where the federal authority proposes the project. This trigger accounts for about 21% of federal environmental assessments under the Act.
- The "*funding trigger*," where the federal authority provides money or other forms of financial assistance or guarantee in relation to a project. This trigger accounts for about 34% of federal environmental assessments.
- The "*land trigger*," where the federal authority grants an interest in land to enable a project to be carried out (i.e., sell, lease or otherwise transfer control of land). This trigger accounts for about 11% of federal environmental assessments.
- The "*law list trigger*," where in relation to a project the federal authority exercises a power or performs a duty or function specified in the *Law List Regulations* made pursuant to section 59(f) (e.g., issues a permit or licence, etc.). This trigger accounts for about 34% of federal environmental assessments.

Where the foregoing requirements (project, federal authority and trigger) are met, section 5 requires that an environmental assessment be carried out on a mandatory basis. In such cases, the federal authority becomes the "responsible authority" for the purposes of the Act (section 11). Where two or more responsible authorities are involved, they together must determine the manner in which they propose to discharge their obligations under the Act. Should they disagree, the Canadian Environmental Assessment Agency (the Agency), established under section 61, is empowered to advise them (section 12).

D. Types of Environmental Assessment

If a project is subject to an environmental assessment, section 14 of the Act provides for several types of assessment, the most important of which are:

- The *screening* assessment. The screening, required by section 18 in relation to all eligible projects that are not on the *Comprehensive Study List Regulations* (discussed next) or the *Exclusion List Regulations* (discussed earlier), is the most flexible type of assessment. It accommodates both simple, routine projects as well as larger projects and is done in over 99% of cases. Pursuant to section 19, a *class screening* may also be conducted in relation to projects that have common characteristics and predictable and mitigable environmental effects (e.g., culvert installations), where the Agency has determined and declared that a screening report can be used as a model in conducting screenings of other projects within the

same class. So far, the Agency has made the requisite declaration in relation to only two class screening reports, although another 15 are currently under development.

- The *comprehensive study*. Governed by sections 21 to 24, the comprehensive study involves a more in-depth assessment, usually reserved for larger-scale projects that are likely to have significant adverse environmental effects and that have been prescribed in the *Comprehensive Study List Regulations* made under section 59(d). A total of 27 comprehensive studies were completed between January 1995 and January 2000, and 19 others were under way.

- The *panel review*. This form of assessment consists of a review by an independent panel, set up by the Minister under section 29, where, even with mitigation:

  - it is uncertain whether the project is likely to cause significant adverse environmental effects;

  - the project is likely to cause significant adverse environmental effects and it must be determined whether these effects are justified in the circumstances; or

  - public concerns warrant investigation by a review panel.

  Review panels may also be established in relation to projects believed to have significant transboundary adverse environmental effects. Five panel reviews were completed between January 1995 and January 2000, and five more were under way.

- The *mediation*. A mediation is a type of assessment carried out by an independent mediator appointed by the Minister under section 30 for the same reasons as the establishment of a review panel. This form of assessment is available only if the interested parties agree to it. Mediation can be used in combination with a panel review. No mediations have been carried out thus far.

In addition to these basic types of assessment, section 40 provides for a *joint review panel*, where two or more entities carry out an assessment on a given project. Provision is also made under section 43 for *substitute panels*, where another federal authority is authorized to conduct an environmental assessment under its own process in substitution for a review panel under the Act.

E. The Factors to be Assessed

Pursuant to section 16, all basic forms of assessment (screening, comprehensive study, panel review or mediation) must include consideration of the following factors:

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- the environmental effects of the project, including its cumulative effects in combination with other projects, past or future;
- the significance of these effects;
- any comments from the public; and
- any mitigation measures that are technically or economically feasible.

Provision is also made for consideration of the need for the project and alternatives to it, but this factor is discretionary. Where a comprehensive study, panel review or mediation is carried out, the following additional factors must be considered:

- the purpose of the project;
- alternative means for carrying out the project that are technically and economically feasible;
- the effects of the project on the capacity of renewable resources to meet current and future needs; and
- the need for any follow-up program.

F. The Decision

There are basically three types of decisions that a responsible authority can make following a *screening* assessment (section 20) or a *comprehensive study* (section 37):

- allow the project to proceed (e.g., provide the funding, issue the permit, etc.) where, with mitigation, the project is *not likely to cause significant adverse environmental effects;*
- disallow the project from going ahead where, with mitigation, the project is *likely to cause significant adverse effects that cannot be justified in the circumstances;*
- refer the project to the Minister for mediation or a review panel under specified circumstances (uncertain adverse environmental effects, public concerns, significant adverse environmental effects that can be justified in the circumstances).

In cases involving *mediation or a panel review*, the appropriate action (allow or disallow the project) may be taken only with the approval of the Governor in Council (sections 37 and 37(1.1)).

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G. The Follow-Up Program

Where, following the assessment, it is decided that a project should be given the go-ahead because, with mitigation, the project is not likely to cause significant adverse environmental effects, or it is likely to cause such effects but they can be justified in the circumstances, the responsible authority is required by section 38 to design any follow-up program considered appropriate and to arrange for the program's implementation. The follow-up program must comply with any regulations made for this purpose under section 59, but none have been developed.

H. The Public Registries

Section 55 requires the establishment of a public registry in relation to every project for which an environmental assessment was carried out, containing all records of the assessment except for specified types of "third party" information. The responsible authority is required to maintain the public registry, except where a mediation or panel review has been established, in which case the Agency is responsible for maintaining the public registry until the mediator or review panel submits its report to the Minister.

I. Participant Funding

The Act, although not yet proclaimed in force, was amended in 1994 (Bill C-56, passed on 15 December 1994) to require the establishment of a participant funding program in relation to mediations and panel reviews (section 58(1.1)). Prior to this amendment, the Act left the establishment of such a fund to the Minister's discretion. It is noteworthy, however, that a participant funding program was launched in 1990 under the old regime to provide financial assistance to members of the public and organizations to prepare for and participate in panel reviews.

J. The Agency

The Canadian Environmental Assessment Agency was established under section 61 of the Act to advise and assist the Minister in carrying out his or her duties and

functions under the Act. The Agency's role, set out in sections 62 and 63, includes the following objects and duties:

- administer and promote compliance with the environmental assessment process under the Act;
- promote uniformity and harmonization in the assessment of environmental effects across Canada at all levels of government;
- ensure opportunities for public participation in the environmental assessment process;
- advocate high-quality environmental assessments through leadership, training and research; and
- negotiate, on the Minister's behalf, certain types of agreements with the provinces and other jurisdictions.

THE FIVE-YEAR REVIEW AND BILL C-9

Section 72 of the current Act requires the Minister to undertake a comprehensive review of the provisions and operation of the Act five years after its coming into force. Within one year after the review is undertaken, the Minister must submit a report on the review to Parliament, including a statement of any recommended changes.

The statutory five-year review was launched on 14 December 1999 with the release of a discussion paper, entitled *Review of the Canadian Environmental Assessment Act, A Discussion Paper for Public Consultation*. A series of more in-depth studies on specific topics – for example, the discussion paper on the section 5 "triggers" and the discussion paper on the assessment of "cumulative effects" – were also made available to the public.

More than 1,200 Canadians participated in broad public consultations that took place between December 1999 and March 2000. Parallel discussions were also held with Aboriginal organizations. In addition, the Minister and the Agency worked closely on the five-year review with the Regulatory Advisory Committee (RAC), a multi-stakeholder advisory body to the Minister, comprising representatives from industry, environmental organizations, Aboriginal communities and governments. The provincial and territorial governments also made a number of specific recommendations for change.

Following these consultations, the Minister tabled his report in Parliament on 20 March 2001. Entitled *Strengthening Environmental Assessment for Canadians*, this report was accompanied by the tabling on the same day of Bill C-9's predecessor, Bill C-19, An Act to Amend the Canadian Environmental Assessment Act.(2)

The amendments proposed in Bill C-9 are based on a consideration of the views presented during the consultation phase. In addition to addressing some of the problems identified during the Act's five years of operation, the amendments also take into account the changed political climate for conducting environmental assessments in this country. Notably, a Sub-agreement on Environmental Assessment was developed under the *Canada-Wide Accord on Environmental Harmonization*, an environmental cooperation framework agreement signed in 1998 by all of Canada's Environment Ministers, except that of Quebec.

The Sub-agreement on Environmental Assessment applies where two or more governments are required under their respective legislation to assess the same proposal. It includes provisions for shared principles, common information elements, a defined series of assessment stages, and a single assessment and public hearing process. The Sub-agreement is implemented through bilateral agreements negotiated between the federal government and individual provinces and territories. To date, bilateral agreements have been signed with Alberta, British Columbia, Manitoba and Saskatchewan.

Clause 2 of Bill C-9 gives effect to this harmonization initiative by specifying that one of the purposes of the Act is "to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects."

A news release issued on 20 March 2001 indicated that the proposed amendments would meet the Minister's three goals for renewing the federal process, namely to:

- provide a greater measure of certainty, predictability and timeliness to all participants in the process;
- enhance the quality of assessments; and
- ensure more meaningful public participation.

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(2) A copy of the bill, the various discussion papers, and the Minister's report are available on the Agency's web site at http://www.ceaa.gc.ca/.

The goals, it was stated, would be achieved through proposed changes in key areas, including the following:

- focusing the Act on those projects with a greater likelihood of adverse environmental effects;
- improving coordination among federal departments and agencies when several are involved in the same assessment;
- re-affirming and enhancing cooperation with other governments in conducting environmental assessments where jurisdictions overlap;
- increasing certainty in the process in order to reduce the potential for project delays and cost increases;
- improving compliance with the Act;
- strengthening the role of follow-up to ensure that sound environmental protection measures are in place for the project;
- improving the consideration of cumulative effects (the combined effects of many projects in a region over a long period of time);
- providing convenient, more timely access to reports and other information about an assessment;
- strengthening the incorporation of Aboriginal perspectives in the federal process; and
- expanding opportunities for public participation.

DESCRIPTION

Clause 1: Definitions

Clause 1(1) revises the definitions of "comprehensive study" and "exclusion list" under current section 2(1) of the Act by adding a reference to the additional sections that are proposed in the bill to deal with these matters.

Clause 1(2), in turn, amends the definition of "federal authority" in current section 2(1) by revising the list of entities that are federal authorities. It eliminates the current reference to "the Toronto Harbour Commissioners constituted pursuant to *The Toronto Harbour Commissioners' Act, 1911*" from that part of the definition. As amended by the Committee, clause 1(2) brings a significantly expanded list of entities under the bill, by including in the

definition of "federal authority" a parent Crown corporation, as defined in section 83(1) of the *Financial Administration Act*, although Export Development Canada, the Canada Pension Plan Investment Board and Crown corporations that are wholly-owned subsidiaries would continue to be excluded from the list. Clause 1(2.1) provides that this amendment will come into force three years after the bill receives Royal Assent.

Clause 1(3) revises paragraph (a) under the current definition of "federal lands" by deleting the following words appearing at the end of paragraph (a): "and lands the management of which has been granted to a port authority under the *Canada Marine Act* or a not-for-profit corporation that has entered into an agreement under subsection 80(5) of that Act."

Clause 1(4) introduces a new definition under the Act, that of "Registry," which means "the Canadian Environmental Assessment Registry established under section 55."

A new clause 1(5) replaces section 2(2) of the Act, providing that insofar as the Act applies to Crown corporations, the "administration of federal lands" includes the ownership or management of those lands.

A new section 2(3) provides, for greater certainty, that works or activities that amount to projects within the meaning of the Act continue to be projects for at least so long as actions are being considered under sections 5, 8, 9, 9.1, 10, or 10.1. This amendment is intended to close what is referred to as the "Red Hill Creek" loophole, clarifying the application of sections 74(4) and 11(1) of the Act.[3] In that case, which involves a well-known highway development in the Hamilton area, the Court held that the advanced stage of the project, including its partial construction, meant that by 1 January 1995 (the date on which the Act came into force) there was no "project" in existence within the meaning of the *Act* for which an environmental assessment was required. Under the new section 2(3), such a development, so long as decisions are still outstanding under one of the listed provisions, will remain "projects" within the meaning of the Act, subject to the requirements of the Act.

Clause 2: Purposes of the Act

In keeping with the Minister's stated goals of improving coordination among participants and of better incorporating Aboriginal perspectives in the assessment process,

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(3) *Regional Municipality of Hamilton-Wentworth* v. *Canada (Minister of Environment)* (2001 FCT 381), appeal dismissed, 2001 FCA 347.

clause 2 adds two new legislative purposes to the five purposes currently set out in section 4 of the Act. The additional purposes are:

- to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects; and
- to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment.

The first purpose enumerated in the bill, which is to ensure that projects receive careful consideration before actions are taken, will now specify that such consideration must be of a precautionary manner, in order to ensure that such projects do not cause significant adverse environmental effects. The fourth purpose, set out in section 4(1)(d), deals with opportunities for public participation. As amended by the Committee, this section now specifies that the Act's purpose is to provide for "timely and meaningful" public participation "throughout" the environmental assessment process. Section 4(2) was added at Committee stage, to provide that the federal government and all bodies subject to the Act must exercise their powers "in a manner that protects the environment and human health and applies the precautionary principle."

Clause 3: Excluded Projects

Clause 3 amends section 7 of the Act. This section exempts projects from an environmental assessment where:

- the project is subject to an environmental assessment under one of the "triggers" in section 5 of the Act, but there is an emergency or the project is described in an exclusion list (section 7(1)); or
- the project is subject to an environmental assessment under the "funding trigger" in section 5(1)(b) of the Act or a power is exercised under section 9(2)(b), 9.1(2)(b) or 10(1)(b) – the funding triggers for harbour commissions and port authorities, prescribed authorities and band councils – but the essential details of the project are not specified before or at the time the funding or other financial assistance is provided (section 7(2)).

Clause 3 amends this section by providing that an environmental assessment is also not required under the foregoing exemptions (emergencies, exclusion list or funded projects of which the basic details have yet to be specified), if the project involves one of the entities mentioned in new sections 8 to 10.1, and that entity is required by regulation to carry out an

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environmental assessment in relation to the project. The entities to which the exemptions in section 7 would also apply if all conditions were met are:

- the Canadian International Development Agency (new section 10.1(2)(b));
- designated Crown corporations (new section 8(1.1)(b));
- designated harbour commissioners/commissions and port authorities (new section 9(2)(b)); and
- other entities designated by regulation made under new section 59(k.3).

Clauses **4** and **5**: Assessments by Crown Corporations, Harbour and Port Authorities, Band Councils, the Canadian International Development Agency and Other Designated Entities

Clauses **4** and **5** apply to the following specified federal entities that are not "federal authorities" within the meaning of the bill: Crown corporations, harbour and port authorities, band councils, the Canadian International Development Agency and other entities designated by regulations made under new section 59(k.3).

Clause **4** of the bill amends section 8 of the Act, to require selected Crown corporations, those that are not federal authorities as defined by the bill, that exercise a specified power or perform a specified duty under section 5 of the Act to carry out an environmental assessment in accordance with any regulations made for this purpose, as early as is practicable in the planning stages of the project and before it exercises any power that would be a trigger under section 5(1). New sections 8(2) and (3) will provide that a federal Minister is not required to ensure that an environmental assessment is conducted merely because a Crown corporation does something that would be a section 5(1)(a), (b) or (c) trigger (proponent, funding or land trigger). If another federal authority is subject to the requirement to conduct an environmental assessment, then the Crown corporation is not required to do so unless it accepts a delegation from the federal authority under section 17 of the Act. Clause **4** revises this section by specifying that the applicable regulations must not only be made but must also have come into force.

Clause **5** amends several existing sections in the Act and adds new ones. First, it amends section 9 by dropping the reference to the Toronto Harbour Commissioners, thus making this section apply only to the Hamilton Harbour Commissioners, a harbour commission, a port authority or a not-for-profit corporation that enters into an agreement under the *Canada Marine*

Act. It further amends this section by specifying that any regulations made under section 59(k) with respect to these entities must "have come into force." It also adds new subsection 9(2), which sets out the triggers under which the entities in question are to conduct an environmental assessment, if the requisite regulations are promulgated. The first four triggers are virtually identical to those proposed in relation to Crown corporations under clause **4**, but there is a variation in the fifth trigger. This trigger requires an environmental assessment of projects carried out in whole or in part on federal lands over which the entity has "administration or management." In contrast, Crown corporations would have to conduct an environmental assessment not only in relation to projects carried out on federal lands managed or administered by them, but also in relation to projects carried out on federal lands owned or held by them or in which they had a right or an interest specified in the regulations.

Clause **5** also adds new section 9.1, which sets out provisions similar to those above-noted ones, but which apply to "authorities" prescribed by regulations made under section 59(k.3) that have come into force. Like Crown corporations and harbour/port authorities, these "prescribed authorities" would be required to conduct an environmental assessment in accordance with the regulations made in relation to them, as early as is practicable in the planning stages of the project and before irrevocable decisions are made. The environmental assessment triggers, set out in new section 9.1(2), are similar to those proposed for harbour/port authorities under new section 9(2), except that under the first two proposed triggers (the "proponent trigger" and the "funding trigger"), the project must be carried out on "federal lands." The requirement that the project be carried out on federal lands is not made in relation to projects proposed or funded by harbour/port authorities under section 9(2).

As well, clause **5** amends current section 10 of the Act, which deals with the environmental assessment of federally funded projects carried out on reserve lands subject to the *Indian Act*. A band council that is the proponent of a project that is to be carried out on reserve lands will be required to ensure that an environmental assessment is conducted before the band council carries out or provides funding to the project, as early as possible in the planning stages of the project and before any irrevocable decisions are made.

Finally, clause **5** adds new section 10.1, which applies to the Canadian International Development Agency (CIDA). If regulations have been made under section 59(*l*.01) and are in force, new section 10.1(1) requires CIDA to carry out an environmental assessment of designated projects, in accordance with those regulations, as early

as practicable in the planning stages of the project and before irrevocable decisions are made. Section 10.1(2) sets out the following two "triggers" for an assessment of the environmental effects:

- where CIDA is the proponent and does any act or thing that commits it to carrying out the project in whole or in part; or
- where CIDA makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance for the purpose of enabling the project to be carried out in whole or in part.

New **section** 10.1(3) stipulates, in turn, that the application of section 5(1) of the current Act (i.e., the triggers applicable to "federal authorities") is suspended while the CIDA regulations are in force.

Clause **5** replaces the words "assessment of the environmental effects" with the defined term "environmental assessment" in a number of places in the four sections that are amended by the clause. Only in section 10.1(2) are the words "assessment of the environmental effects" retained, signifying that such assessments, performed by CIDA as the proponent or source of funding, might not meet all the requirements of the Act, but rather must meet the requirements of the regulations applying to CIDA.

Clause **6**: Ministerial Orders and Injunctions

Under existing section 11, the "federal authority" to which one of the section 5 triggers applies assumes the title of "responsible authority" and becomes responsible for carrying out the environmental assessment in accordance with the Act.

Clause **6** adds new section 11.1, which empowers the Environment Minister or the minister to whom the "responsible authority" is answerable before Parliament (or the Ministers together, where there is more than one "responsible authority") to issue an order prohibiting a project proponent from doing anything to carry out the project that would alter the environment until the responsible authority decided whether the project should go ahead (new s. 11.1(1)). The ministerial order takes effect immediately, but it expires 14 days later, unless it is approved by the Governor in Council (new s. 11.1(2) and (3)). The order is exempt from selected procedural requirements in the *Statutory Instruments Act* dealing with the making of regulations, but it

would have to be published in the *Canada Gazette* within 23 days after being approved by the Governor in Council (new s. 11.1(4)).

Where an order issued under new section 11.1 is about to be contravened or is likely to be contravened, new section 11.2 empowers the court, on the application of the Attorney General of Canada or any interested person, to issue an injunction against the relevant party or parties, enjoining them from doing any act or thing that would contravene the order until the responsible authority had decided whether the project should go ahead (new s. 11.2(1)). A minimum 48-hour notice of the application would have to be given to the relevant party(s) before the issuance of the injunction unless the urgency of the situation was such that the delay involved in giving the notice would not be in the public interest (s. 11.2(2)).

Clause 7: Federal Environmental Assessment Coordinator

In recognition of the difficulties that may arise where more than one entity is involved in a project, clause 7 creates the office of the "federal environmental assessment coordinator" (the "coordinator"). New section 12.1 sets out the coordinator's role, which is to:

- coordinate the participation of federal authorities in the environmental assessment process for a project where a screening or comprehensive study might be required; and
- facilitate communication and cooperation among federal authorities and other participants, such as the provinces, Crown corporations, harbour/port authorities, band councils and other specified Aboriginal governments or governing bodies, foreign governments and international organizations of states.

Under new section 12.2, the coordinator is required to carry out the following duties, in accordance with any regulations that may be made under new section 59(a.1):

- ensure that the federal authorities that are or may become responsible authorities, as well as those that are or may be in possession of specialist or expert information or knowledge regarding the project, are identified;
- coordinate their involvement throughout the environmental assessment process;
- coordinate the fulfilment by responsible authorities of their obligation to include specified records and information on the Registry, in both the electronic and paper forms, except for that information that must be kept confidential under section 20 of the *Access to Information Act*;

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- ensure that federal authorities fulfil their obligations under the Act in a timely manner; and
- coordinate the involvement of federal authorities with other jurisdictions.

In carrying out the foregoing duties, new section 12.3 stipulates that the coordinator may, in accordance with any regulations made under new section 59(a.1), establish and chair a committee composed of federal authorities that are or may become responsible authorities, as well as those who have or may have specialist or expert information or knowledge regarding the project. After consulting these parties, the coordinator may establish time lines regarding the project. In consultation with the federal authorities that are or may become responsible authorities, the coordinator may also determine the timing of any public participation.

New section 12.4(1) specifies that the Canadian Environmental Assessment Agency (the Agency) is to be the coordinator in relation to projects described in the comprehensive study list, or projects that are subject to the environmental assessment process of another specified jurisdiction (i.e., provincial governments, selected Aboriginal governments or governing bodies, foreign governments and international organizations of states). With regard to other projects, new section 12.4(2) provides that if only one responsible authority is involved in the project, that authority is the coordinator; where more than one responsible authority is involved, the coordinator is, in accordance with any regulations made under new section 59(a.1), the one that the responsible authorities select, or the one that is designated by the Agency should the responsible authorities fail to make their selection within a reasonable time.

New section 12.4(3) allows the coordinator to be changed by agreement under specified conditions. New section 12.4(4) adds that such agreements may apply generally and not specifically to a particular project.

New section 12.5 requires every federal authority to comply in a timely manner with requests and determinations made by the coordinator in the course of carrying out its duties or functions.

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Clause **8**: Community Knowledge, Aboriginal Traditional Knowledge and Regional Studies

Clause **8** adds two new sections (ss. 16.1 and 16.2) after current section 16 of the Act, which lists the factors to be considered in carrying out an environmental assessment.

New section 16.1 provides that community knowledge and Aboriginal traditional knowledge may be considered in conducting an assessment.

New section 16.2 stipulates in turn that where the environmental effects of possible future projects in a region have been studied and a federal authority participated in the study, outside the scope of this Act, with a specified jurisdiction (provincial government, Aboriginal government or other Aboriginal governing body), the results of such a study may be taken into account in conducting an environmental assessment of a project in that region, particularly in considering any cumulative effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out.

New section 16.3 requires responsible authorities to document and make available to the public their determinations under sections 20 (decisions following screening) and 21.1(1) (track determination).

Clause **9**: Screenings

Section 18(1) of the current Act requires that a "screening" be conducted in relation to projects that are not described in the comprehensive study list or the exclusion list. Clause **9**(1) amends this section by specifying that the exclusion list is the one made by regulations under section 59(c). This amendment reflects the fact that the bill proposes two exclusion lists:

- the exclusion list in new section 59(c), which revises the current list in section 59(c); and
- the exclusion list in new section 59(c.1), which creates a new list of possible exclusions regarding projects carried out by specified entities (e.g., projects carried out outside Canada by Crown corporations or the Canadian International Development Agency, in certain circumstances).

Clause **9**(2) in turn amends section 18(3) of the Act. Currently, this section requires a responsible authority, in the case of a screening, to give the public notice and an opportunity to participate (e.g., examine and comment on the screening report and on any other

record filed in the public registry) before making a determination on whether the project should go ahead, if the responsible authority is of the opinion that it is appropriate to do so in the circumstances or where it is "required by regulation." Before providing the public with an opportunity to comment, the responsible authority will be required to post on the Internet registry a description of the scope of the project, the factors to be taken into account in the screening, and the scope of those factors. The public must also have an opportunity to examine and comment on the screening report and other records included in the registry before the responsible authority makes a decision under section 20. The responsible authority will also have discretion to permit other opportunities for public participation, although decisions about timing could be made by the federal environmental assessment coordinator under section 12.3(c).

Clause **10**: Class Screenings

Clause **10** amends the "class screening" provisions in section 19 of the Act to increase the opportunities for using a class screening report in relation to projects considered to be routine with known environmental effects. Currently, section 19(1) authorizes the Canadian Environmental Assessment Agency (the Agency), on the request of the relevant responsible authority and subject to the prescribed public notice and comment provisions, to declare a "screening report" to be a "class screening report," if the Agency determines that the screening report could be used as a model in conducting screenings of other projects within the same class.

Clause **10** changes this section in several respects. Under proposed new section 19(1), it drops the current requirement for a request by the responsible authority, and it specifies the circumstances under which the declaration may be made: the Agency may declare a report to be a class screening report, if projects of the class described in the report are not likely, in the Agency's opinion, to cause significant adverse environmental effects when the design standards and mitigation measures described in the class screening report are applied.

Clause **10** also introduces new section 19(2), which requires the Agency to include in the declaration it makes under new section 19(1) a statement that the class screening report may be used either as:

- a "replacement" for the screening that must be carried out under section 18 in relation to the project, and the ensuing decision that must be made under section 20 on whether the project should proceed (the "replacement" designation is new); or

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- a "model for streamlining" the screening required under section 18 for projects of that class (the "streamlining" designation is a reworded version of the only use for which a screening report may be put under current section 19(1)).

Prior to making the declaration, the Agency must comply with the requisite notice and comment provisions, which are revised under new section 19(3) and which include new requirements to notify the public of the date on which a "draft" class screening report will be made available and the place where copies of the draft may be obtained, to take public comments into account and to publish them in the Registry.

The publication requirements regarding declarations, currently set out in section 19(3) of the Act, are also revised under proposed new section 19(4). Notably, this new section requires the Agency to post its declarations, together with the related reports (or information on how to obtain copies of the reports), on the new electronic Registry established by clause 26.

Proposed new section 19(5) absolves a responsible authority from having to take further action under section 18 (conducting a screening) and section 20 (deciding on the appropriate course of action), where the responsible authority is satisfied that the project falls within a class of projects for which a class screening report has been made and declared by the Agency under new section 19(2)(a) to be appropriate for use as a "replacement" for the screening and related decision, as long as the responsible authority ensures that the design standards and mitigation measures described in the report are implemented.

New section 19(6) is a reworded version of current section 19(4). It provides that where a responsible authority is satisfied that a class screening report, which has been declared under new section 19(2)(b) to be appropriate for use as a "model for streamlining" the screening, applies to a project, new section 19(6) authorizes the responsible authority to make use or permit the use of the relevant class screening report, as well as any screening on which it is based, to whatever extent the responsible authority considers appropriate for the purpose of complying with the screening requirements under section 18.

New sections 19(7), (8) and (9) are reworded versions of current sections 19(5), (6) and (7). They contain amendments that are consequential to the changes made in the previous subsections.

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Clause **11**: Decision Following a Screening

Current section 20(1) of the Act sets out the courses of action that are open to a responsible authority following the screening of a project. One option is to allow the project to go ahead (i.e., provide the funding, issue the permit, etc.) where the project is not likely to cause significant adverse environmental effects if appropriate mitigation measures are implemented (s. 20(1)(a)). Current section 20(2) requires the responsible authority to ensure the implementation of such measures.

Clause **11** replaces section 20(1)(a) and amends the first of the possible courses of action that may be taken by a responsible authority after screening. Along with new section 20(1.1), the provision permits projects to be approved based, at least in part, on mitigation measures that the responsible authority considers appropriate. In this respect, the responsible authority is not limited to mitigation measures within the legislative authority of Parliament, and the responsible authority must ensure the implementation of those mitigation measures in any manner necessary.

Clause **11** also adds new section 20(2.1), which requires a "federal authority" to provide any assistance requested by a "responsible authority" to ensure the implementation of a mitigation measure on which both have agreed.

Finally, clause **11** replaces current section 20(3) of the Act with a new section that deletes the current requirement for the responsible authority to file a notice in the public registry of a decision taken under current section 20(1)(b) to disallow a project from going ahead because, even with mitigation, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances. This amendment is consequential to clause **25**, which replaces the public registry with a combined electronic and paper Registry.

Clause **12**: Comprehensive Studies

With regard to projects described on the comprehensive study list, current section 21 of the Act requires a responsible authority to:

- ensure that a comprehensive study is conducted and a related report is prepared and provided to the Minister and the Agency; or
- refer the project to the Minister for a referral to a mediator or review panel under section 29.

Clause **12** replaces these provisions with a series of new measures which mandate that a decision be made early in the comprehensive study process to ensure that a project is not subject to both a comprehensive study and a mediation or panel review.

Specifically, with regard to projects described on the comprehensive study list, new section 21 requires the responsible authority to:

- report to the Minister on selected matters (itemized below) as soon as the responsible authority forms the opinion that it has sufficient information to do so and the public has been provided with an opportunity to participate; and
- recommend to the Minister that the environmental assessment be continued by means of a comprehensive study, or that the project be referred to a mediator or review panel in accordance with section 29.

The matters that must be covered in the report are:

- the scope of the project, the factors to be considered in the assessment, and the scope of those factors;
- public concerns in relation to the project;
- the project's potential to cause adverse environmental effects; and
- the ability of the comprehensive study to address issues relating to the project.

After taking the responsible authority's report and recommendation into account, the Minister is given the following two choices under new section 21.1(1):

- refer the project back to the responsible authority so that it may continue the comprehensive study, and ensure that a comprehensive study report is prepared and provided to the Minister and to the Agency; or
- refer the project to a mediator or review panel under section 29.

The Minister's decision under new section 21.1(1) is final; new section 21.1(2) precludes the Minister from referring the project to a mediator or review panel where he or she has decided to send it back to the responsible authority for continuation of the comprehensive study.

Where the project is sent back to the responsible authority, new section 21.2 requires that the public be provided with a further opportunity to participate in the comprehensive study, subject to any decision of the federal environmental assessment coordinator under new section 12.3(c) regarding the timing of the participation.

Clause **13**: Minister's Decision Regarding Projects Subject to a Comprehensive Study

Current section 23 of the Act sets out the Minister's options after consideration of the comprehensive study report and any comments made by the public under section 22 (which is not amended by the bill). Depending on whether the project, with mitigation, is likely to cause significant adverse environmental effects and depending also on the public's concerns, the Minister currently has two choices:

- refer the project back for a decision by the responsible authority under section 37; or
- refer the project to a mediator or review panel.

Clause **13** follows through on the changes proposed by clause **12**, which precludes the possibility of a project being subject to both a comprehensive study and a mediation or panel review. Clause **13** thus replaces current section 23 with a new section that is limited to projects in relation to which a decision has been made to continue the comprehensive study. In such cases, the Minister, after taking the comprehensive study report and the public's comments into consideration, is required under new section 23(1) to send the project back to the responsible authority for a decision under section 37 of the Act as to whether the project should be allowed to proceed. Under a new requirement, the Minister must also issue an "environmental assessment statement," setting out:

- his or her opinion as to whether, taking into account the implementation of any mitigation measures the Minister considers appropriate, the project is or is not likely to cause significant adverse environmental effects; and
- any mitigation measures or follow-up program that the Minister considers appropriate, after having taken into account the views of the responsible authority and other federal authorities concerning the measures and program.

However, if before issuing the environmental assessment statement the Minister is of the opinion that additional information is necessary or that there are public concerns that need to be further addressed, new section 23(2) requires him or her to request that the project's proponent or any federal authorities that, under new section 12.3(a), are or may become a responsible authority, or that have specialized knowledge or expertise in relation to the project, ensure that the necessary information is provided or actions are taken to address the public's concerns.

Clause **14**: Mediation

Where at any time after the environmental assessment of a project or part of the assessment has been referred to a mediator, and the Minister or mediator determines that the mediation of any issue under consideration is not likely to produce a result that is satisfactory to all the participants, the Minister is currently required under section 29(4) to terminate the mediation of that issue(s) and refer the issue(s) in controversy to a review panel. Clause **14** amends this section by dropping the requirement that the unresolved issues be referred to a review panel. It also replaces the words "shall terminate the mediation of the issue" with "shall order the conclusion of the mediation," thus terminating the mediation process in its entirety rather than only those aspects of it that are problematic.

Clause **15**: Linguistic Change

Clause **15** effects a minor wording change to the French text of section 32(1): it replaces the words "l'achèvement" with the words "la fin."

Clause **16**: Closed Hearings and Non-Disclosure of Harmful Evidence

Current section 35(3) of the Act requires a review panel to hold hearings that are open to the public unless the panel is satisfied, after representations made by a witness, that specific, direct and substantial harm would be caused to the witness by the disclosure of such evidence, document or other thing that the witness has been ordered to adduce by the review panel. Clause **16**(1) extends this exception to situations where to give the evidence or produce the document would cause "specific harm to the environment."

Current section 35(4) stipulates, in turn, that where a review panel is satisfied that the disclosure of evidence, documents, etc., would cause specific, direct and substantial harm to a witness, such evidence, documents, etc., are privileged and must not, without that witness' authorization, knowingly be (or be permitted to be) communicated, disclosed or made available by any person who has obtained such evidence or documents pursuant to this Act. Clause **16**(2) creates new section 35(4.1), which extends this non-disclosure rule to situations where the review panel is satisfied that disclosure of the evidence, documents, etc., would cause specific harm to the environment. However, the privileged information could be disclosed if authorized by the review panel.

Clause **17**: Decision following a Comprehensive Study, Mediation or Panel Review

Current section 37(1) of the Act sets out the courses of action open to a responsible authority once a project has undergone a comprehensive study, mediation or panel review. Clause **17**(1) makes a consequential amendment to this section with respect to projects referred back for a comprehensive study under new section 23(1). It also makes section 37(1) subject to new sections 37(1.2) and (1.3), which are added by clause **17**(2).

New section 37(1.2) applies exclusively to projects in relation to which a report has been submitted by a mediator or review panel. With regard to such projects, the responsible authority, before taking the appropriate course of action under current section 37(1), is required by current section 37(1.1) to take the report of the mediator or panel review into consideration and, with the approval of the Governor in Council, to respond to it. New section 37(1.2) adds to this measure by providing that where, in relation to a project, there is, in addition to the responsible authority, a "federal authority" that meets the criteria (described below), that federal authority may act as the responsible authority for the purpose of providing the response. The "federal authority" to which this new section applies is:

- a federal authority within the definition of "federal authority" under section 2(1), provided the Minister through whom the federal authority is accountable to Parliament agrees; and
- the federal authority that, pursuant to current section 5(2)(b):
  - recommends to the Governor in Council that it take the requisite action (issue the permit, give its approval, etc.) in relation to a project for which an environmental assessment is required by regulations made under section 59(g),
  - assumes the prescribed functions of a "responsible authority" with regard to that project.

New section 37(1.3) applies, in turn, to projects in relation to which a decision has been made under new section 21.1(1)(a) to continue with the comprehensive study. With regard to such projects, and where under new section 23(1) the Minister has issued an environmental assessment decision statement to the effect that the project is likely to cause significant adverse environmental effects, new section 37(1.3) precludes the responsible authority from taking action under section 37(1) without first obtaining the Governor in Council's approval.

Clause **17**(3) creates new sections 37(2.1) and (2.2), which permit responsible authorities to take into account mitigation measures that are outside the legislative authority of Parliament, including mitigation measures that the responsible authority can ensure or that it is satisfied will be implemented by another person or body. If the responsible authority can ensure performance of the mitigation measures, then it is under a duty to do so under section **37**(2.2). Clause **17**(3) also adds new section 37(2.3) and replaces current section 37(3) with an amended version. Some of the changes proposed by this clause – which applies to projects that underwent a comprehensive study, mediation or panel review – are identical to those proposed by clause **11** in relation to projects on which a screening was carried out. Thus, clause **17**(3):

- adds new sections 37(2.1) and (2.2) to clarify the meaning of current section 37(2). It provides that, for greater certainty, in selecting appropriate mitigation measures and in ensuring their implementation, the responsible authority is not limited by the Act of Parliament that confers the powers that the responsible authority exercises or the duties or functions that it performs; and

- adds new section 37(2.3), which requires a "federal authority" to provide any assistance requested by a "responsible authority" to ensure the implementation of a mitigation measure on which both have agreed.

Clause **18**: Follow-Up Programs

Where, following an environmental assessment, it is found that, with mitigation, a project is not likely to cause significant adverse environmental effects and the responsible authority decides to exercise its authority to allow the project to proceed under section 20(1)(a) (in the case of a screening) or section 37(1)(a) (in the case of a comprehensive study, mediation or panel review), current section 38(1) requires the responsible authority to design an appropriate follow-up program in accordance with the applicable regulations and to "arrange" for its implementation.

Clause **18** amends the foregoing requirement regarding follow-up programs, but only with regard to projects for which a screening was carried out. With regard to such projects, new section 38(1) requires the responsible authority to design the requisite follow-up program and to "ensure" (as opposed to "arrange") its implementation only if the responsible authority considers that a follow-up program is appropriate in the circumstances. The need to design and "ensure" (as opposed to "arrange") the implementation of a follow-up program continues to be a requirement under new section 38(2) for projects for which a comprehensive study, mediation or panel review was carried out.

In designating a follow-up program and ensuring its implementation, new section 38(3) provides that the responsible authority is not limited by the Act of Parliament from which it derives its authority to act in relation to the project.

New section 38(4) requires a federal authority to provide any assistance requested by a responsible authority in ensuring the implementation of a follow-up program on which both have agreed.

Finally, new section 38(5) provides that the results of follow-up programs may be used for implementing adaptive management measures and for improving the quality of future environmental assessments.

Clause **19**: The Establishment of Joint Review Panels

Current section 40 deals with projects that might be subject to both a panel review under the Act and an environmental assessment by another "jurisdiction" in Canada (as described in the chart below). With regard to such projects, if they involve a "jurisdiction" defined in current section 40(1)(a) to (d), the Minister is empowered under current section 40(2)(a) to enter into an agreement or arrangement with that jurisdiction regarding the joint establishment of a review panel and the manner in which the assessment is to be carried out. However, where in such cases the project involves a "jurisdiction" defined under section 12(5), the Minister is required by current section 40(2)(b) to offer to consult and cooperate with that other jurisdiction with respect to the environmental assessment.

"Jurisdiction" – Section 12 (5)	"Jurisdiction" – Section 40(1)(a) to (d)
A "jurisdiction" is defined in section 12(5) as: (a) the government of a province; (b) an agency or a body that is established pursuant to the legislation of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a project; (c) a body that is established pursuant to a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to an assessment of the environmental effects of a project; or (d) a governing body that is established pursuant to legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a project.	A "jurisdiction" is defined in section 40(1)(a) to (d) as: (a) a federal authority; (b) the government of a province; (c) any other agency or body established pursuant to an Act of Parliament or the legislature of a province and having powers, duties or functions in relation to an assessment of the environmental effects of a project; (d) any body established pursuant to a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and having powers, duties or functions in relation to an assessment of the environmental effects of a project.

Clause **19** essentially restructures current section 40(2) and amends the type of "authority" the other jurisdiction must have in relation to a project before the Minister is authorized or required to take the above-noted action (i.e., establish a joint review panel, or consult and cooperate). Thus:

- under new section 40(2)(a), the Minister may enter into an agreement or arrangement regarding the joint establishment of a review panel and the manner in which it is to conduct the assessment, if the relevant jurisdiction under section 40(1)(a) to (d) has "powers, duties or functions in relation to the assessment of the environmental effects of a project." In contrast, current section 40(2) provides that such a jurisdiction must have "a responsibility or an authority to conduct an assessment of the environmental effects of the project *or any part of it*."

- under new section 40(2)(b), the Minister must offer to consult and cooperate with the other jurisdiction regarding the environmental assessment of the project, if the relevant jurisdiction under section 12(5) "has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part of it." In contrast, current section 40(2)(b) does not specify the type of authority that the other jurisdiction must have before the Minister is required to consult and cooperate.

Clause **19**(2) was added at Committee stage. It replaces section 40(3), replacing the words "assessment of the environmental effects" of a project with "environmental

assessment." Under this section, if a project can be referred to a review panel under the Act, and a foreign government or international organization is responsible for assessing the environmental effects of part or all of the project, then the Environment Minister and the Minister of Foreign Affairs may enter into an agreement with that jurisdiction jointly establishing a review panel, and governing the environmental assessment to be conducted by that panel.

Clause **20**: Attributes of Joint Review Panels

Clause **20** amends current section 41(d) to provide that a joint review panel has all the powers "and immunities" accorded review panels under current section 35. At present, section 41(d) accords joint review panels only the "powers" of review panels, but not their "immunities." As amended at Committee stage, **new section** 41 refers to "environmental assessment," rather than "assessment of the environmental effects," to reflect the intention that assessments by joint review panels should meet the requirements of the Act.

Clauses **21** to **23**: Projects with Transboundary Environmental Effects

If a project to be carried out in a province is not otherwise subject to an environmental assessment by a federal authority under one of the "triggers" in current section 5 of the Act or under any other Act of Parliament or regulation, and the Minister is of the opinion that the project may cause significant adverse environmental effects in another province, current section 46(1) of the Act empowers the Minister to refer the project to a mediator or a review panel for an assessment of the environmental effects of the project in that other province.

A similar authority is conferred on the Minister with respect to projects:

- to be carried out in Canada or on federal lands, which may have significant adverse environmental effects occurring both outside Canada and outside those federal lands (current section 47(1));
- to be carried out in Canada, which may have significant adverse environmental effects on:
  - lands in a reserve that is set apart for the use and benefit of a band and that is subject to the *Indian Act*,
  - a park or park reserve as defined in the *Canada National Parks Act*,
  - federal lands other than the reserve or park lands mentioned above,

- lands that are described in a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that are prescribed,
- lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed, or
- lands in respect of which Indians have interests (current section 48(1));

- to be carried out on:
  - lands in a reserve that is set apart for the use and benefit of a band and that is subject to the *Indian Act*,
  - lands that are described in a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that are prescribed, or
  - lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed;

  which may cause significant adverse environmental effects outside those lands (current section 48(2)).

Where potential transboundary effects on park land are at issue, the Minister is required to take into account the park's ecological integrity, under new section 48(1.1).

Clauses **21** to **23**(2), respectively, amend the foregoing sections by dropping the words "or conferred by or under any other Act of Parliament or regulation." These amendments thus broaden the situations in which the Minister could take action under these sections, because the Minister could now intervene in cases involving a federal authority that was authorized "by or under any other Act of Parliament or regulation" to exercise or perform the requisite power, duty or function.

Clause **23**(3) in turn amends current section 48(5) by adding parties entitled to notice of the Minister's intention to refer a project to a mediator or a review panel under section 48(1) and (2).

Clause **24**: International Agreements

Where the federal government or a federal authority enters into an agreement with a government or other entity to provide financial assistance under section 5(1)(b) in relation to projects that are to be carried out both outside Canada and outside federal lands, and the essential

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details of such projects are not specified, current section 54(2) requires the federal government or federal authority to ensure, where practicable and subject to other applicable agreements, that the agreement or arrangement provides for an environmental assessment of such projects, as early as practicable in the planning stages, before irrevocable decisions are made, and in accordance with either the Act or regulations, or with an environmental assessment process that is in effect in the foreign state in which the projects are to be carried out and that is consistent with the requirements of the Act. However, current section 54(3) provides that the foregoing measures do not apply regarding an agreement or arrangement which calls for the funding to be provided only after the essential details of the projects are specified.

Clause **24** amends these provisions by extending the requirements in section 54(2) to similar projects funded by the Canadian International Development Agency under new section 10.1(2)(b), and by extending the exception in section 54(3) to such projects.

Clause **25**: Canadian Environmental Assessment Registry

Current section 55 requires each responsible authority to establish and maintain a "public registry" containing prescribed information on the environmental assessments carried out under their authority. Where, however, a project is referred to a mediator or review panel, the Agency assumes responsibility for maintaining the registry until the ensuing report is submitted to the Minister. Clause **25** replaces this section with new section 55 which calls for the establishment and maintenance of a new registry, called the "Canadian Environmental Assessment Registry" (the Registry), whose purposes are given under new section 55(1):

- to provide notice in a timely manner of the environmental assessments to be carried out; and
- to facilitate public access relating to such assessments.

As amended at Committee stage, the Canadian Environmental Assessment Registry will consist of an Internet site as well as the project files that currently make up the registry established under the Act. **Section** 55(3) requires the Agency to make paper copies of electronic records available in a timely manner on request. **Sections** 55.1 to 55.3 deal with the Internet site, while **section** 55.4 relates to the project files, which must be included in the Registry.

Under new section 55.1(3), the Agency has the authority to determine:

- the form of the Internet site and the manner in which it is to be kept;
- how the records are to be included in it;
- the information that must be contained in the records that must be included in the Registry under new section 55.1(2);
- when such information must be included, provided items are included at least 30 days before any decision is taken by a responsible authority, the Minister or the Agency, and when it may be removed; and
- how the Internet site is to be accessed.

Subject to whatever determinations the Agency makes under the foregoing provision, new section 55.1(2) lists the type of information that must be included in the Registry, for example:

- a notice of the commencement of an environmental assessment, within two weeks except where a class screening report is used (new section 55.1(2)(a));
- a statement of the projects in relation to which a class screening report is used (new section 55.1(2)(d));
- a notice of termination of the environmental assessment by the responsible authority, or by the Minister in relation to cases referred to him or her for mediation or panel review, where the responsible authority has decided against allowing the project to proceed (new section 55.1(2)(f) and (g));
- a notice of the Minister's decision to refer a project back to the responsible authority for continuation of the comprehensive study (new section 55.1(2)(i);
- the screening or comprehensive study report (or how to obtain a copy of the report) that the responsible authority has taken into consideration before arriving at a decision in relation to a project, except where a class screening report is used (new section 55.1(2)(k));
- the response, as approved by the Governor in Council, of a responsible authority (or substitute federal authority) to the report of a mediator or review panel (new section 55.1(2)(q)); and
- a summary of the follow-up program that was instituted and its results (or how to obtain this information) (new section 55.1(2)(t)).

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At Committee stage, several additional items were added to the section 55.1(2) list, including:

- a description of the scope of the project (new section 55.1(2)(c));
- where the public is to have an opportunity to participate in a screening, or when a project is referred to a responsible authority to continue a comprehensive study, a description of the factors to be taken into account and the scope of those factors, or an indication of how such a description may be obtained (new section 55.1(2)(j));
- the terms of reference of a mediation or review panel (new section 55.1(2)(n)); and
- Notice of whether follow-up is considered appropriate (new section 55.1(2)(s)).

The list under new section 55.1(2) is not exhaustive. The Agency or responsible authority is empowered under new section 55.1(2)(v) to include in the Registry any other information considered appropriate, including information in the form of a list of relevant documents and where such documents may be obtained. Any other record or information may also be required by regulations made under new section 59(h.1).

New sections 55.2 and 55.3 set out the types of records listed under new section 55.1(2) that the Agency or a responsible authority must ensure are included in the Registry. Notably, a responsible authority is required under new section 55.3(2) to ensure that, every three months or with such other frequency that is agreed to with the Agency, a statement is included in the Internet site of the projects for which a class screening report is used.

New section 55.4 will govern the part of the Registry to be contained in project files, or the hard copy records that must be maintained under the Act. A project file must be maintained by the responsible authority for every environmental assessment undertaken until any follow-up aspect of it is completed. Also, where the project is referred to a mediator or review panel, the project file must be maintained until the report is submitted to the Minister. Under section 55.4(2), the project file must contain all records produced, collected or submitted in relation to an environmental assessment, including all records included in the Internet site, any reports or public comments, and any records relating to mitigation measures or follow-up programs.

New section 55.5(1), however, requires the Agency or the responsible authority to ensure that confidential third-party information within the meaning of section 20 of the *Access to Information Act* is not included in the Registry (including both the project files and the Internet

site), unless otherwise permitted under that section. The information subject to non-disclosure under section 20[4] comprises:

- trade secrets of a third party;
- financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

New section 55.5(2), in turn, makes sections 27, 28 and 44 of that Act apply to the third-party information that the Agency or responsible authority intends to include in the Registry. These sections require that the relevant government institution:

- give notice of its intention to disclose the prescribed third-party information;
- provide the third party with an opportunity to make representations; and
- where it is decided to disclose the information, inform the third party that he or she may apply for judicial review.

The foregoing provisions in new section 55.5(2) are similar to those contained in current section 55(5) of the Act. The "non-disclosure" rule in proposed new section 55.5(1), however, has a different emphasis than the more "pro-disclosure" rule found in current section 55(4)(b).

Finally, new section 55.6 revises current section 55(6). This section protects a responsible authority or the Minister (or persons acting on their behalf or under their direction), or a director or officer of a Crown corporation to which the Act applies, from being sued or prosecuted. It also disallows proceedings to be taken against the Crown or a responsible authority for the disclosure in good faith of any record or part of a record under this Act

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(4) Section 20 of the *Access to Information Act*, as well as sections 27, 28 and 44, are reproduced in the Appendix.

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(including any consequences flowing from the disclosure), or for failure to give any notice required under section 27 or any other provision of the *Access to Information Act* if reasonable care is taken to give the required notice. New section 55.6 amends the current section by extending the protection against civil and criminal proceedings to the Agency as well. It also limits the protection afforded for failure to give notice under "section 27 or any other provision" of the *Access to Information Act* to breaches involving "sections 27 or 28" only, as opposed to "any other provision" of the Act.

Clauses **26** and **27**: Quality Assurance Program

Clause **26** replaces the current heading "Statistical Summary" with a new heading, "Relevant Information," to reflect the fact that additional data may have to be supplied under new section 56.1, above and beyond the yearly statistical summary of environmental assessments and related decisions that "responsible authorities" are required to prepare under current section 56.

Clause **27** creates new section 56.1, which requires "federal authorities" and other specified persons or bodies (Crown corporations, harbour and port authorities, relevant band councils, the Canadian International Development Agency, etc.) to provide to the Agency, upon its request, any information in relation to the assessments whose conduct they ensure under the Act, that the Agency considers necessary in support of the quality assurance program it is required to establish and lead under new section 63(1)(d).

Clause **28**: Minister's Powers and Expansion of the Participant Funding Program

Section 58 of the Act sets out the Minister's powers. Clause **28**(1) creates a new ministerial power to make regulations prescribing projects for which comprehensive study is required, where the Minister is satisfied that that class of projects is likely to have significant adverse environmental effects. This power is currently among the list of Cabinet regulation-making powers set out in section 59(d) of the Act, but that provision would be repealed by clause **29**(2.1) of the bill.

Current section 58(1.1) requires the Minister to establish a participant funding program to facilitate the public's participation in mediations and panel reviews. Clause **28** expands this program by making the funding available for comprehensive studies and joint panel reviews as well.

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Clause **29**: Regulation-Making Authority

Clause **29** amends the Governor in Council's regulation-making authority under current section 59 of the Act in a number of material respects, as described below.

New section 59(a.1) is added, which authorizes regulations to be made regarding the duties and functions of the "federal environmental assessment coordinator," established under new sections 12.1 to 12.4, and regarding the selection and designation of the coordinator.

The conditions in current section 59(c) under which projects or classes of projects may be exempted from having to undergo an environmental assessment are revised. Notably, new section 59(c) drops the current exclusionary ground regarding the responsible authority's "minimal" involvement with the project, and it adds a new exclusionary ground, namely:

- the projects or classes of projects have a total cost below a prescribed amount and they meet prescribed environmental conditions (new section 59(c)(iii)).

New section 59(c.1) is added, which applies specifically to the Canadian International Development Agency, and Crown corporations (or any corporation controlled by them) that have been designated, either individually or by class, by regulations made under new section 59(j). With regard to these entities, new section 59(c.1), in replacement of the exemptions made under new section 59(c), allows regulations to be made exempting from the requirement to conduct an assessment under either new section 8 (Crown corporations) or 10.1 (CIDA), any projects or classes of projects to be carried out outside Canada and any federal lands, under the following conditions (which are identical to those set out in new section 59(c)):

- where, in the opinion of the Governor in Council, the projects or classes of projects should not be assessed for reasons of national security;
- where the projects relate to a physical work and, in the opinion of the Governor in Council, have insignificant environmental effects; or
- where the projects or classes of project have a total cost below a prescribed amount and they meet prescribed environmental conditions.

As mentioned above, section 59(d) dealing with the comprehensive study list regulation is repealed. Section 59(h), which deals with the information disseminated in the

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Registry, is replaced by a series of regulations – 59(h) to (h.3) – dealing with the two parts of the Canadian Environmental Assessment Registry. The sections authorize regulations to govern the records to be included in the project files and Internet site, facilities for the public to review the project files, and the charging of fees for copies of documents.

Section 59(*i*) currently empowers Cabinet to make regulations varying or excluding any requirement of the Act's environmental assessment process to adapt the process in certain circumstances. Section 59(*i*)(ii) covers projects to be carried on outside Canada and any federal lands, and clause 29(3.1) replaces the wording of that sub-clause to include in it federal lands described in the section 2(1)(a) definition of "federal lands." This change empowers Cabinet to make regulations varying or exempting the environmental assessment process for projects outside Canada or lands owned or controlled by the federal government.

New section 59(h.3) is added, which authorizes regulations to be made prescribing the manner of designing a follow-up program.

New section 59(*i*)(l) is added, which applies to projects to be carried out outside Canada and any federal lands, which are subject to an assessment by a Crown corporation to which the Act applies. With regard to such projects, this new section allows regulations to be made prescribing, in specified circumstances and on any specified terms and conditions:

- the federal authorities that, notwithstanding the application of a trigger under section 5, are not required to conduct an assessment of such projects; and
- the federal authorities for whom the requirements under the Act – except for the course of action to be taken with regard to those projects following a screening under section 20(1) or following a comprehensive study, mediation or panel review under new section 37(1) – are deemed to be satisfied by the assessment carried out by the Crown corporation in accordance with new section 8. Note that new section 59(*i*)(2) authorizes the development of additional regulations to vary the decision-making powers of the foregoing federal authorities under section 20(1) and new section 37(1).

New section 59(j) modifies current section 59(j) with respect to environmental assessments by Crown corporations. For the purposes of new section 8, new section 59(j) authorizes regulations to be made:

- designating Crown corporations that are not federal authorities, either individually or by class; and

- prescribing the manner in which such corporations are to carry out environmental assessments and follow-up programs, as well as any action to be taken regarding projects during the assessment process. Regulations developed under this heading may vary by corporation or class of corporation. Authority is also provided to make regulations regarding the application of provincial laws.

Three new sections are added regarding Crown corporations or corporations controlled by them:

- For the purposes of new section 8, and with regard to proposals to be carried out outside Canada and any federal lands, new section 59(j.1) authorizes regulations to be made prescribing, in replacement to any counterpart regulations that may be made under current section 59(b), the physical activities or classes of physical activity for which an environmental assessment must be carried out by the corporations that have been designated by regulations under new section 59(j). Note that a similar power of substitution is proposed under new section 59(c.1) in relation to "projects" that are not "physical activities."

- New section 59(j.2) authorizes regulations to be made prescribing as a "trigger" for which an environmental assessment must be carried out under new section 8(1.1)(d), any power, duty or function conferred on a designated corporation under any Act of Parliament or regulation.

- New section 59(j.3) authorizes regulations to be made prescribing the circumstances in which designated corporations must ensure that an environmental assessment is conducted under new section 8(1.1)(e) regarding projects to be carried out in whole or in part on federal lands held, owned, managed or administered by them or in relation to which they have any right or interest. Regulations may also be made specifying the right or interest that they must have in relation to such lands.

New section 59(k) amends current section 59(k), which applies to the entities (harbour and port authorities, etc.) referred to in new section 9. For the purposes of section 9, new section 59(k) authorizes regulations to be made prescribing the manner in which these entities must conduct environmental assessments and follow-up programs, as well as the manner in which any action is to be taken in relation to projects during the assessment process. For the foregoing purposes, regulations may also be developed regarding the application of provincial laws. Note that similar regulatory authority is provided under new section 59(j) regarding designated Crown corporations (and corporations controlled by them).

Two new sections are also added regarding the port and harbour authorities, etc., referred to in section 9:

- New section 59(k.1) authorizes regulations to be made prescribing as a "trigger" for which an environmental assessment must be carried out under new section 9(2)(d), any power, duty or function conferred on the harbour and port authorities. This authority is similar to the one conferred under new section 59(j.2) regarding designated Crown corporations.

- New section 59(k.2) authorizes regulations to be made prescribing the circumstances in which harbour and port authorities must conduct an environmental assessment under new section 9(2)(e) in relation to projects to be carried out in whole or in part on federal lands managed or administered by them. A similar authority is conferred under new section 59(j.3) regarding designated Crown corporations.

New section 59(k.3) applies to "authorities" other than federal authorities that may be required to carry out an environmental assessment under new section 9.1 if they are "prescribed" authorities under regulations made under new section 59(k.3). This new section 59(k.3) thus authorizes regulations to be made:

- prescribing, by class, authorities other than federal authorities for the purposes of new section 9.1; and

- prescribing the manner in which the prescribed classes of authorities must conduct environmental assessments and follow-up programs, as well as the manner in which any action is to be taken in relation to projects during the assessment process. The manner in which these matters are to be dealt with may vary by class of authority. Furthermore, for the foregoing purposes, regulations may be made regarding the application of provincial laws. Note that similar regulatory authority is provided under new sections 59(j) (designated Crown corporations) and 59(k) (harbour and port authorities).

New regulatory authority, similar to that provided in relation to designated Crown corporations under new sections 59(j.2) and (j.3) and to port and harbour authorities under new sections 59(k.1) and (k.2), is also provided in relation to "prescribed authorities" under new sections 59(k.4) and (k.5):

- New section 59(k.4) authorizes regulations to be made prescribing as a "trigger" for which an environmental assessment must be carried out under new section 9.1(2)(d), any power, duty or function conferred on the prescribed authority under any Act of Parliament or regulation.

- New section 59(k.5) authorizes regulations to be made specifying the circumstances in which prescribed authorities must conduct an environmental assessment under new section 9.1(2)(e) regarding projects to be carried out in whole or in part on federal lands managed or administered by them or in relation to which they have any right or interest. Regulations may also be made specifying the right or interest that these authorities must have in relation to such lands.

New section 59(*l*) amends current section 59(*l*), which deals with the assessment of projects on Indian reserves. The proposed amendment under new section 59(*l*) is similar to those proposed under new section 59(j)-(j.3) (designated Crown corporations), new section 59(k)-(k.2) (harbour and port authorities), and new section 59(k.3)-(k.5) (prescribed authorities). Thus, new section 59(*l*) and (*l*.001) authorizes regulations to be made for the purposes of section 10:

- designating bands individually or by category; and
- prescribing the manner in which those bands or classes of bands must carry out an environmental assessment and follow-up plan in relation to projects that are to be carried out, in whole or in part, on an Indian reserve that is set apart for the use and benefit of a designated band, as well as regulations prescribing the manner in which any action is to be taken in relation to projects during the assessment process. Regulations made in relation to the foregoing matters may vary by band or category of band.

New section 59(*l*.01) authorizes the following regulations to be made for the purposes of new section 10.1, which applies exclusively to the Canadian International Development Agency (CIDA):

- regulations varying the definition of "project" in current section 2(1);
- regulations regarding the manner in which an environmental assessment and follow-up program must be carried out regarding projects in relation to which CIDA is the proponent or to which it provides financial assistance under new section 10.1(2), as well as regulations regarding any action to be taken with respect to those projects during the assessment process;
- regulations exempting CIDA from having to carry out an environmental assessment in cases where an agreement or arrangement has been entered into with another jurisdiction or person under new section 54(2);
- regulations varying or excluding any of the provisions of section 54 in their application to CIDA. Section 54 deals with certain types of federally funded projects governed by a federal/provincial agreement or an international agreement; and
- regulations providing for the application of section 55.4 to CIDA. This section, as amended by clause **25**, protects specified entities (responsible authorities, the Minister, the Agency and/or the Crown) from being sued or prosecuted in relation to specified matters.

New section 59(*l*.02) authorizes regulations to be made varying or excluding any of the provisions of sections 55 to 55.5 in their application to CIDA. These sections set out:

- the information that must be included in the electronic Registry;
- the entities who are responsible for supplying it; and
- the circumstances under which third-party information may or may not be disclosed.

Finally, new section 59(*l*.03) will allow Cabinet to make regulations prescribing, for the purposes of section 18(3), circumstances in which responsible authorities will be required to allow public participation in screenings.

Clauses **30** and **31**: Expanded Objects and Powers of the Canadian Environmental Assessment Agency

Clause **30** adds two new objects to the roster of objects currently set out for the Agency under section 62 of the Act:

- that of promoting and monitoring compliance with the Act, as well as the quality of assessments that are carried out; and
- that of engaging in consultation with aboriginal peoples on policy issues related to the Act.

Clause **31**(1), in turn, expands the Agency's current list of duties in section 63(1) by requiring that it also "establish and lead a quality assurance program for assessments conducted under the Act" and ensure that proponents and federal authorities comply with the provisions of the Act and its regulations. Related provisions regarding the Agency's proposed quality assurance program are contained in new section 56.1, created under clause **27**.

Finally, clauses **31**(1.1) and (2) add the following new discretionary powers to those currently specified for the Agency under section 63(2):

- coordinate the development of a response to a report under section 37(1.1)(a) (response of a responsible authority to a mediator or panel review report);
- assist parties in building consensus and resolving disputes; and
- request federal authorities, and the entities referred to in new sections 8 to 10 (designated Crown corporations, harbour and port authorities, prescribed authorities and band councils) to provide information regarding the assessments that they conduct under the Act.

Clause **32**: Review and Report

As amended at Committee stage, this clause will require that within seven years of the bill receiving Royal Assent, a comprehensive review of the provisions and operation of the Act must be undertaken by a parliamentary committee. The committee will have one year to undertake its review and report to Parliament.

Clause 33: Transitional Provision

Clause 33 provides that any environmental assessment commenced prior to the coming into force of this clause shall be continued and completed as if Bill C-9 had not been enacted.

Clause 34: Coming into Force

By virtue of clause 34, the provisions of Bill C-9 come into force on a day or days to be fixed by order of the Governor in Council.

COMMENTARY

Reaction to the amendments proposed in this bill was initially favourable. Such diverse groups as the Mining Association of Canada and the Environmental Planning and Assessment Caucus (EPAC) of the Canadian Environmental Network issued news releases on their websites expressing general support for Bill C-9's predecessor, Bill C-19.

In a news release issued on 20 March 2001, the EPAC stated that some of the proposed amendments would improve environmental assessment. These changes, the group remarked, were welcome, especially those that seek to improve the public's opportunity to become more involved in the planning of projects that affect the environment. The EPAC also congratulated the Agency for striving to conduct a thorough and transparent review, and for moving forward to Parliament on many issues where a consensus was found among the diverse interests. However, the EPAC expressed a number of concerns. Noting that the proposed amendments would depend heavily on corresponding administrative support to become effective, it questioned whether there would be sufficient funding to meet the new requirements under the Act. It also criticized the proposed legislation for failing to entrench some fundamental principles of planning for sustainability in the federal environmental assessment process. For example, there would still be no requirement under the Act to consider alternative development

approaches for *all* projects. There would also still be no requirement to conduct environmental assessment at the regional planning and policy levels. Without these strategic planning tools, the EPAC stated, the Canadian public and project proponents will continue to be at odds over environmental sustainability as each project is proposed.

The Mining Association of Canada also endorsed Bill C-9's predecessor, Bill C-19, in its news release of 21 March 2001, although it, too, had some reservations. Stating that the proposed amendments would add greater clarity, certainty and timeliness to the regulatory process for resource development, the Association commended the federal government for the "bold and important steps" it was taking, and urged expeditious consideration of the bill. It noted that the amendments were generally consistent with the recommendations of the multi-stakeholder Regulatory Advisory Committee (RAC) (of which the Association is a member), adding that the amendments would help to clarify the Act's purpose and strengthen requirements for timely review, which should provide project proponents and investors with greater confidence in terms of the predictability of Canada's regulatory regime for resource development. Although it viewed the proposed amendments as a step forward, the Association acknowledged that they did not go as far as industry wanted, and it indicated that the Association would be examining opportunities for working with its RAC partners before Parliament to make additional improvements to the bill.

During its study of Bill C-9, the House of Commons Standing Committee on Environment and Sustainable Development heard from a number of witnesses that the scope of changes proposed by the bill would entail only minor alterations to the environmental assessment process under the Act. Many concerns were expressed about fundamental matters outside the narrow purview of the bill, including the need for consideration of alternatives in environmental assessment, the self-assessment nature of the process, and the need for a statutory strategic environmental assessment (SEA) regime. There was also general support for the changes proposed in the bill, along with suggestions for improvements, which are reflected in the many amendments made at Committee stage. Since many witnesses attributed the narrow scope of the bill to the restricted nature of the ministerial review that had preceded the bill's introduction, an amendment was made to the bill to require that another review be performed in seven years that would be under the direction of a parliamentary committee, rather than the Minister.

APPENDIX

Selected Sections from the *Access to Information Act*

Third party information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Product or environmental testing

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

Methods used in testing

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

Preliminary testing

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

Disclosure if a supplier consents

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

Disclosure authorized if in public interest

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

Notice to third parties

27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(a) trade secrets of a third party,

(b) information described in paragraph 20(1)(b) that was supplied by a third party, or

(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

Waiver of notice

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

Contents of notice

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

Extension of time limit

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

Representations of third party and decision

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

Representations to be made in writing

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

Contents of notice of decision to disclose

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

Disclosure of record

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

Third party may apply for a review

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Notice to person who requested record

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

Person who requested access may appear as party

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.